EVIDENT PARTIALITY OF ARBITRATORS:

MULTIPLE/OVERLAPPING APPOINTMENTS

By

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I. Introduction

In the last decade, there have been a growing number of challenges to arbitration decisions, some derived from one statutory basis for vacating an award, "evident partiality" of an arbitrator.[i] The purpose of this article is to examine selected case law focused on a particular fact situation, that being overlapping or multiple appointments of one or more members of the panel which have been alleged to cause "evident partiality" in those so appointed.

II. Standards and Guidelines for Evident Partiality

Two different standards for evident partiality emerged from *Commonwealth Coatings Corp. v. Continental Casualty Co.* 393 U.S. 89 (1968) which involved the failure of an arbitrator to reveal that one of the parties to the arbitration was a regular customer. For a plurality, Justice Black wrote

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive of no way in which the effectiveness of the arbitration process will be hampered by the *simple*

> *requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias*.

Id. at 148-9 (emphasis added).

Justice White concurred in the *Commonwealth Coatings* decision commenting that arbitrators are not automatically disqualified by a business relationship is disclosed to the parties. He further wrote:

> The Court today does not decide that arbitrators are to be held to the standards of judicial decorum . . . . It is often because they are men of affairs, not apart from the marketplace, that they are effective in the adjudicatory function.
> . . . .
> Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm, which has done more than a trivial business with a party, that fact must be disclosed.

Id. at 150 – 2 (concurring opinion).

In reviewing this case law, subsequent courts have blended the opinions of Justices Black and White and articulated the evident partiality standard in various ways. In *Positive Software Solutions, Inc. v. New Century Mortg. Corp.,* 476 F.3d 278, 283 (5th Cir. 2007) the court stated the issue as whether the nondisclosure involves a "significant compromising relationship." In *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.,* 492 F.3d 132, 137 (2nd Cir. 2007) the court stated the issue was whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." For a very similar articulation of the issue, *see Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 n. 30 (3rd Cir. 1994). The court in *Woods v Saturn Distribution*

Corp., 78 F.3d 424, 427 (9th Cir. 1996) described the issue as whether the non-disclosed information creates a "reasonable impression of bias."

Several courts have identified factors useful in application of the evident partiality test. *See Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60, 74 (2nd Cir. 2012) describing factors adopted in the Fourth Circuit:

> (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.

See also, the standards used by district courts in the Second Circuit described in note 18. *Id.*

III. Typical Disclosures of Reinsurance Arbitrators

Although disclosures have evolved over time, it is typical for arbitrators to disclose in some detail current and past involvement with the parties, counsel and other arbitrators. Arbitrators commonly recognize an ongoing duty to continue to make such disclosures during the course of the arbitration.

Similarly, the ARIAS-US Code of Conduct, Canon IV provides, in part:

> 1. Before accepting an arbitration appointment, candidates should make a reasonable effort to identify and disclose any direct or indirect financial or personal interest in the outcome of the proceeding or any existing or past financial, business, professional, family or social relationship that others could reasonably believe would be likely to affect their

judgment, including any relationship with persons they are told will be potential witnesses.

. . . .

3. The duty to disclose all past and present interests or relationships is a continuing obligation throughout the proceeding. . . .

IV. Application to Overlapping / Multiple Appointment of Arbitrators

Sometimes a party arbitrator and umpire on one panel will be appointed to another panel shortly thereafter or even simultaneously. Some might view this troublesome cronyism on the basis that such close association suggests a unity of interests or, at least, point of view.

Sometimes a party arbitration for a party in one dispute is asked to serve as a party arbitrator for the opponent in another arbitration. Sometimes an umpire in one dispute is asked to serve as a party arbitrator for a party in the original dispute. Sometimes a party arbitrator in one dispute is asked to serve as an umpire in another dispute involving the same party.

It is questionable whether most people involved in reinsurance arbitrations in the United States would view first fact situation (hereinafter "overlapping appointments") as a conflict however, the great majority would view it as something to be disclosed to the parties. There is no question that most people involved with arbitrations in the United States would view the second group of fact situations (hereinafter "multiple appointments") as producing a conflict of interest. In general, arbitrator and umpire candidates would decline the second appointment outright or, as least, ask the parties to consider waiving the conflict. As is demonstrated below, case law is more forgiving than one would expect with respect with respect to the fact situations described above.

A. Overlapping Appointments

One case that has received a good deal of attention in recent years is *Scandinavian Reinsurance Co. Ltd. v. St. Paul Fire and Marine Ins. Co.*, 668 F.3d 60 (2nd Cir. 2012). In this case, the party arbitrator for St. Paul and the umpire failed to inform the parties of subsequent appointment to an arbitration panel handling a dispute between different parties but with some similarities to the original dispute. St. Paul's arbitrator was a party arbitrator in the subsequent arbitration and the umpire in the original matter was appointed to the same role in the second arbitration. These individuals acknowledged an ongoing obligation to make appropriate disclosures but, for reasons not evident in the opinion, failed to disclose the second arbitration, which was running concurrently with the first.

Scandinavian Re argued that overlapping service of these two arbitrators in two matters with some similarities was indicative of bias and a nontrivial conflict of interest. The court rejected this argument:

> [W]e do not think the fact that two arbitrators served together in one arbitration at the same time that they served in another is, without more, evidence that they were predisposed to favor one party over another in either arbitration. The undisclosed matter here was overlapping arbitral service, not a "material relationship with a party," . . . in which a reasonable person could reasonably infer a connection between the undisclosed outside relationship and the possibility of bias for or against a particular arbitrating party. [ii]

A similar fact situation and ruling occurred in *Ario, as Receiver of American Integrity Ins. Co. v. Cologne Reinsurance (Barbados), Ltd.*, 2009 U.S. Dist. Lexis 1066133 (M.D.Pa). The receiver sought reinsurance recoverables from Cologne and instituted an arbitration proceeding. After the panel was assembled, the party arbitrator for Cologne and the umpire were appointed to a second panel involving different parties but which overlapped in time with the original arbitration. The umpire informed counsel in the first dispute of his appointment in the second, but several months and several rulings after it occurred. The

receiver argued that the second appointment gave the umpire a pecuniary interest, which created an appearance of bias. The court rejected this argument:

> We also conclude that there is no evident partiality from an arbitrator's accepting a position as an umpire in another, unrelated arbitration while the current arbitration is still ongoing, even if that position was partially obtained by the action of a party-appointed arbitrator, or is a position in an arbitration where one of the parties is an affiliate of a party to the current arbitration. Reinsurance is a field sufficiently specialized that those with expertise can be expected to serve on multiple arbitration panels. [iii]

Another receiver v. reinsurer dispute is presented by *Transit Casualty Co. v. Trenwick Reinsurance Co.,* 659 F.Supp. 1346 (S.D.N.Y. 1987). The receiver challenged a panel ruling on the basis that the party arbitrator for the reinsurer appointed the umpire to the same role in another panel, causing the umpire to be biased. The court rejected this as a basis to vacate the award noting that at oral argument counsel admitted that the small number of qualified arbitrations meant that "arbitrators often sit together on a number of arbitrations." [iv]

A case sustaining an objection of evident partiality is *Crow Construction Co. v. Jeffrey M. Brown Assoc. Inc., 264 F. Supp. 217 (E.D.Pa. 2003).* This involved an AAA administered arbitration in which the parties selected arbitrators from a list provided by the AAA. During the hearing, counsel for Crow learned that two of the arbitrators were serving simultaneously in an arbitration involving Brown who was represented by the same attorney as in the Crow dispute. This had not been disclosed. Subsequent discovery determined that these same arbitrators had been involved in numerous arbitrations or mediations with Brown or its counsel, none of which had been disclosed. The court concluded that this fact situation fit the "appearance of bias" standard but hastened to add that this did not amount to a finding of actual bias.[v]

B. Multiple Appointments

Several of the cases described immediately above involved multiple as well as overlapping appointments. In *Ario, supra,* the party arbitrator for the receiver, during the pendency of the arbitration, accepted an appointment as umpire in a dispute with an affiliate of the same reinsurer as was involved in the Ario dispute, but the new dispute settled before an organizational meeting was held. As was the case with overlapping appointments, the court ruled against the receiver observing that appointment to a role in an arbitration in which one of the parties is an affiliate of a party in a current arbitration is not *per se* evident partiality.

Trustmark Ins. Co. v. John Hancock Life Ins. Co., 631 F. 3d 869 (7th Cir. 2011) involved a replay of an earlier arbitration result that Trustmark attempted to attack on the basis that Hancock failed to turn over in discovery certain critical documents. Hancock reappointed its arbitrator from the earlier arbitration but the other panelists were new appointees. An issue arose as to whether or not the confidentiality agreement in the first arbitration prevented evidence and decisions in the first arbitration to be revealed in the second arbitration. Trustmark asked the court to enjoin Hancock's party arbitrator from participating in the second panel's consideration of this matter. The basis for this motion was that he was not "disinterested" as was required by the relevant reinsurance contract.

The court rejected Trustmark's arguments, and the lower court's decision, ruling that "disinterested" means "lacking a financial or other personal stake in the outcome." [vi] The court continued:

> Instead of asking whether [Hancock's arbitrator's] had a financial or other personal stake in the outcome, the district court asked whether he had knowledge about the dispute. . . . [P]rivate parties often select arbitrators precisely *because* they know something about the

> controversy. Arbitration need not follow the pattern of jury trials, in which a fact finder's ignorance is a prime desideratum. Nothing in the parties' contract requires arbitrators to arrive with empty heads.[vii]

A case finding evident partiality based on multiple appointments is *Dealer Computer Services, Inc. v. Michael Motor Co.,* 761 F. Supp. 2d 459 (S.D.Tex. 2010). This case resulted from a dispute over a hardware maintenance and software support contract, which called for an arbitration administered by the AAA. Dealer's appointed neutral arbitrator disclosed that she previously served on a panel involving Dealer and another party. In fact, the prior arbitration involved another auto dealership, the same issue with respect to the same clause of a virtually identical contract and a number of the same witnesses for Dealer. (In all probability, Dealer's arbitrator did not have enough information to be aware of all these overlaps at the time of her initial disclosures, but she did not later supplement her disclosures.)

The court found that the lack of more fulsome disclosures by Dealer's arbitrator "created a 'reasonable impression of bias' and rose to the level of 'evident partiality.'"[viii] The court observed:

> It would be unreasonable to expect that an arbitrator who had already signed an eight-page opinion ruling for a party as to how a contractual provision should be interpreted to change her mind in a subsequent arbitration and rule against that party on the exact same contractual provision. Likewise, it would be unreasonable to expect an arbitrator who had fully adopted the damages theories of an expert witness to then reject the damages theories of that same witness on similar issues in a subsequent arbitration. . . . [T[hese prior connections to [Dealer] and to the issues in the arbitration are not mere technicalities, but strongly

> suggest that [Dealer's arbitrator] may have prejudged the liability and damages issues in the Michael Motor Arbitration.[ix]

V. Commentary

The above case law suggests: (1) the courts are very reluctant to find evident partiality on the part of arbitrators; and (2) the disclosure requirements that reinsurance arbitrators commonly impose on themselves to avoid an allegation of evident partiality are more than sufficient to meet the standards articulated in relevant case law.

ENDNOTES

[i] Federal Arbitration Act 9 U.S.C.A §10 (a)(2).

[ii] 668 F.3d 60 at 74-5. *See also* note 20 in which the court cites cases observing that overlapping service is inevitable in fields such as reinsurance in which there is a limited number of qualified arbitrators.

[iii] 2009 U.S. Dist. Lexis 106133 *31.

[iv] 659 F. Supp. 1346 at 1354.

[v] 264 F. Supp. 217 at 224 n. 2

[vi] 631 F.3d 869 at 872.

[vii] *Id.* at 873 (emphasis in the original).

[viii] 761 F. Supp. 459 at 464.

[ix] *Id.*